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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 227—September Term, 1970

(Argued November 17, 1970 Decided December 11, 1970.)

Docket No. 35119

UNITED AIRCRAFT CORPORATION,
Plaintiff-Appellee,

v.

CANEL LODGE No. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Defendant-Appellant.

Before:

KAUFMAN, HAYS and GIBBONS,*
Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut, Clarie, *J.*, which directed the appellant labor union to proceed to arbitration pursuant to the terms of a collective bargaining agreement.

Affirmed.

PLATO E. PAPPS and MOZART G. RATNER, Washington, D. C., *for Appellant.*

JOSEPH C. WELLS, Washington, D. C., *for Appellee.*

GIBBONS, *Circuit Judge*:

Plaintiff-appellee, United Aircraft Corporation (the Company), petitioned the district court for an order directing the defendant-appellant, Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), to proceed to arbitration pursuant

* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

to the terms of a collective bargaining agreement executed between the Company and the Union on December 5, 1968. That agreement contains a comprehensive grievance procedure and lists thirty-nine types of grievances which shall, if not resolved in one of four grievance steps, be submitted to arbitration. Among those grievances which must be submitted to arbitration upon the request of either party is:

> "1. A grievance concerning the discharge or disciplinary suspension of an employee."

Also relevant to this case are these additional contract provisions:

> "Article IV
>
> Non-Discrimination
>
> The company and the union recognize that employees covered by this agreement may not be discriminated against because of race, color, sex, age, or religious belief, nor because they engage in activities which are protected by the National Labor Relations Act, as amended.
>
> Both the company and the union recognize that employees covered by this agreement have the right to become or remain members of the union or to refuse to become or remain members of the union without being subject to restraint or coercion from either the company or the union because of their exercise of this right.
>
> There shall be no solicitation of employees for union membership or dues conducted upon the premises of the company during working hours by the union, its representatives or by employees.
>
> • • •
>
> Appendix A
>
> Section 1. The union shall assume all responsibility for the distribution and collection of payroll deduction

assignment cards for union dues and the initiation fee, and agrees that such distribution and collection will not be carried on during working hours on company premises."

The contract provides for dues check off from the pay of those union members who have executed payroll assignment cards. It expressly recognizes that the grievance and arbitration procedures are available to employees, to the Union, and to the Company.

An employee, Tobin, a Union shop steward, was suspended by the Company for one day on December 30, 1969, as a disciplinary punishment for his alleged violation on December 15, 1969, of Company rules which limited employees' rights to distribute or collect payroll assignment cards for dues check off. Neither the employee nor the Union made any attempt to bring this suspension into the grievance procedure. Instead, after the time had expired within which under the contract the employee could appeal his suspension through the grivance procedure, the Union filed a charge with the National Labor Relations Board (the Board). This charge alleged that Tobin's disciplinary suspension was a pretext, an interference with rights guaranteed in Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1964), and a violation of Section 8(a)(1)(3) and (5) of the Act.

When it learned of the unfair labor practice charge the Company filed a grievance concerning Tobin's suspension, contending that it was for violating the rule against working hours solicitation of assignment cards. The Union declined to discuss the grievance and refused to participate in contract arbitration. It contended that because the General Counsel of the Board issued a complaint after investigation of its unfair labor practice charge, the contract arbitration procedure was inapplicable. The Company then filed the instant petition under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1964),

seeking an order directing the Union to proceed to arbitration. The district court entered such an order on June 24, 1970, from which order the Union appeals.

While this action was pending in the district court, the Company moved before the Board Trial Examiner to stay the Board proceedings, pending disposition of the lawsuit. The Trial Examiner granted the motion. The General Counsel and the Union then filed a special appeal to the Board, which on June 3, 1970, reversed the Trial Examiner and directed him to proceed with a decision on the merits of the unfair labor practice charge. Thus at this juncture the dispute over Tobin's suspension is being litigated before the Board and, pursuant to the district court order, by contract arbitration.

The Union's chief contention is that the dispute over Tobin's suspension does not fall within the arbitration provisions of the contract. The district court found that the Company had presented a grievance cognizable under those provisions, and we agree. The Union argues that the dispute is over Tobin's disciplinary suspension, not over Tobin's alleged breach of the Company's rule and his alleged breach of the no solicitation clause in the contract. Only by a completely strained reading of the contract and a completely unrealistic definition of the dispute could the Court arrive at such a conclusion. Our duty is to order arbitration where under any reasonable construction the contract would cover the grievance, not to strain for unreasonable constructions. *International Union of Electrical Workers* v. *General Electric Co.*, 407 F.2d 253, 256 (2 Cir. 1968).

Next the Union contends that if the agreement, properly interpreted, makes subject to arbitration alleged Company conduct which would be an unfair labor practice, such an agreement is unenforceable as against public policy, because it permits the arbitrator to invade the province of the Board. That contention has long since been foreclosed.

N.L.R.B. v. *Strong*, 393 U.S. 357 (1969); *N.L.R.B.* v. *C. & C. Plywood Corp.*, 385 U.S. 421 (1967); *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1964); *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197-198 (1962); *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 101 n. 9 (1962). In the words of the Supreme Court, ". . . the authority of the Board and the law of the contracts are overlapping concurrent regimes, neither pre-empting the other." *N.L.R.B.* v. *Strong, supra* at 360.

Indeed upon occasion the Board in exercising its concurrent statutory jurisdiction will defer to an arbitrator's award upholding discipline against employees, rather than adjudicating the employee's 8(a)(3) charge on the merits. See, e.g., *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) and discussion in *Office Employees Local 425* v. *N.L.R.B.*, 419 F.2d 314, 317-320 (D.C. Cir. 1969). The possibility of such deferral by the Board is the basis for the Union's final contention, that the existence of concurrent jurisdiction coupled with the possibility of deferral by the Board, may in some cases deprive the Union of any advantage which might be gained by its choice of a forum. It is clear that an employer may not resist contract arbitration on the ground that it prefers the Board as a forum *Carey* v. *Westinghouse Electric Corp., supra* at 268; *Smith* v. *Evening News Ass'n, supra.* We perceive no compelling reason why a Union which has executed an arbitration agreement should be in a more favorable forum shopping position. The Union argues that the district court has exacted a price for its resort to the processes of the National Labor Relations Act before the Board, in that it is being forced simultaneously to arbitrate. This argument is specious, for the court had nothing to do with the execution of the collective bargaining agreement in which the Union undertook to arbitrate. Where there is such an agreement there is concurrent contract and Board jurisdiction.

This case does not present as issues when or to what extent the Board should defer to an arbitrator's decision,

nor does it present as an issue when the Board should postpone its own proceeding until the conclusion of contract arbitration. See *Dubo Mfg. Co.*, 142 N.L.R.B. 431 (1963). It presents only the propriety of the district court's order enforcing an arbitration agreement at a time when a dispute arising out of the same facts is pending before the Board. That order was proper, and it will be affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 13,760

UNITED AIRCRAFT CORPORATION, *Petitioner*,

v.

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Respondent*.

Memorandum of Decision

The plaintiff-employer, United Aircraft Corporation, (Company), brought this equitable action to compel the arbitration of a grievance arising out of the administration of a collective bargaining contract[1] with Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, (Union). Jurisdiction of the subject matter exists pursuant to § 301 of the Labor Management Relations Act of 1947, 61 Stat. 1956, 29 U.S.C. § 185. The pleadings, affidavits and exhibits, together with counsels' oral representations to the Court disclose that there remain no factual issues to be litigated. The plaintiff-company has presented a grievance between the parties cognizable within the terms of the existing collective bargaining agreement; one which creates a contractual duty on the part of the Union to arbitrate.

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[1] Plaintiff's Exhibit "A".

Facts

Tobin, a Union shop steward, was suspended by the Company for one day, on December 30, 1969, as a disciplinary punishment for his alleged violation, on December 15, 1969, of Company rules, which limited employees' rights to distribute or collect Union "check off cards" during working hours.[2] Neither Tobin nor the Union filed any grievance under the terms of the labor contract arising out of the Company's action, although Article VII, § 1, 3(a)(1) thereof, authorized them to do so. Section 10 of said contract provides that such an employee's right to appeal his discharge or suspension is conditioned upon his filing such grievance within five (5) working days from the date of the occurrence thereof. However, in this instance, after the five days had expired and the employee's grievance remedy under the contract was foreclosed, the Union filed an unfair labor practice charge with the National Labor Relations Board (NLRB) on January 6, 1970, alleging that the Company's action violated Tobin's statutory right under §§ 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3), to be free from Company discrimination.

The plaintiff-employer asserts that the labor agreement specifically provides for a grievance procedure, which was designed to promote the settlement of disputes between the employer, the Union and the Union membership. It points specifically to Article VII, § 1, which provides:

> "In the event that a difference arises between the company, the union or any employee concerning the

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[2] Agreement with Lodge 700, International Association of Machinitsts, Article IV. (Para. 3) provides:

> "There shall be no solicitation of employees for union membership or dues conducted upon the premises of the company during working hours by the union, its representatives or by employees."

interpretation, application or compliance with the provisions of this agreement, an earnest effort will be made to resolve such difference in accordance with the following procedure which *must* be followed." (Emphasis added).

While the contract provides for four steps in the ordinary procedure for processing individual employee grievances, it permits the Company or the Union to institute a grievance at the third step. Only where the dispute cannot be settled at the fourth step and within the list of grievances listed in Article VII, § 3 is it provided that the matter shall be submitted to arbitration.[3] It further provides that the arbitrator's decision, supported by substantial evidence, shall be final and conclusive and binding upon all employees, the Company and the Union.

As soon as the plaintiff-employer first became aware of the defendant's pending labor board charge, it promptly wrote to the Union, on January 13, 1970, requesting that the dispute concerning Tobin's suspension be placed in the grievance procedure at the third step.[4] When the Union refused to consider the matter on these terms,[5] the Company, on January 19, 1970, sought to place the matter in the grievance procedure at the fourth step.[6] The Union reiterated its position by letter dated January 26, 1970, and advised the Company that it would not

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[3] Article VII., Section 3 provides in part:

"(a) The following grievances, if not settled at Step 4 of Section 1 of this Article, shall be submitted to arbitration upon the request of either party hereto filed in accordance with the provisions of this Article.

'1. A grievance concerning the discharge or disciplinary suspension of an employee.' "

[4] Plaintiff's Exhibit "B".

[5] Plaintiff's Exhibit "C1".

[6] Plaintiff's Exhibit "C2".

consider "Tobin's suspension" at any step of the grievance procedure.[7] Thereupon, the plaintiff-employer, on January 29, 1970, requested, in writing, that the dispute be submitted to arbitration pursuant to the collective bargaining contract.[8] The Union rejected plaintiff's request on the grounds that Tobin's suspension was not a grievance for arbitration, because it did not involve the interpretation, application or compliance with the provisions of the agreement; but rather that it posed a question relating to the construction and application of a governing federal statute.[9] The plaintiff thereupon filed the present court action in an effort to compel arbitration under the collective bargaining contract.

Meanwhile, the General Counsel of the NLRB issued a complaint against the Company. The respondent moved to stay further action at the hearing before the Trial Examiner pending the outcome of this action. The Examiner reserved his ruling on the motion and testimony was taken on a provisional basis. On May 15, 1970, he entered an order in Case No. 1-CA-6967, withholding any further action pending the outcome of this suit and included the following pertinent observation:

> "(T)his dispute over one-day's suspension of an employee is now engaging the attention of a Board Trial Examiner and a federal court, and, if it takes the same course as other litigation between the same parties, this dispute will ultimately require consideration by Board members and a federal appellate court, and will consume untold man-hours of their time as well as of the time of Board staff members and of the staff of the General Counsel, in addition to the time already spent thereon. . . .

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[7] Plaintiff's Exhibit "C4".

[8] Plaintiff's Exhibit "E".

[9] Plaintiff's Exhibit "F".

"It is true that more is involved here than one day's backpay for one man. If Respondent is ultimately found to have discriminated against Tobin, the conventional remedy would include a requirement that it post a notice promising not to discriminate against employees for Union activity. However, the Board has recently issued two decisions finding that Respondent discharged or suspended a number of employees, including union stewards, for Union activity and requiring it to post at various of its plants, including the one here involved, notices abjuring any future resort to such conduct. Petitions for review of both those cases are pending before the Court of Appeals for the Second Circuit. If the Board prevails in either of these cases, an appropriate notice will have to be posted by Respondent, which will presumably cure the coercive effect of any past discrimination, including that here involved."

"It is clear, therefore, that apart from compensating Tobin for loss of one day's pay, little, if anything, will be gained by the inordinate expenditure of money and time required to process this matter further. In view of this, it may be too much to hope that the parties, with the help of their exceptionally able counsel, will devise some formula for disposing of this matter without further litigation." (See Petitioner's Motion to Lodge).

The General Counsel thereupon appealed the Trial Examiner's ruling and represented to the Board that the Company had been recently involved in many alleged discriminatory and unfair labor practices of a similar kind and that in the light of past history the Trial Examiner's recommendations were unrealistic. He contended that the outcome of the Court proceeding to compel arbitration was irrelevant, because the Board would, in the circum-

stances of this case, assert jurisdiction with or without concurrent arbitration.

On June 3, 1970, the Board granted the General Counsel's appeal, reversed the Trial Examiner's ruling staying the proceedings and directed him to proceed forthwith with his decision on the merits of the proceeding. (See Respondent's Motion to Lodge).

DISCUSSION

Labor arbitration law, still in its formative stages, has not dogmatically defined the areas and circumstances under which contractual arbitration directed in the bargaining agreement shall be given free reign to function. The fluid development of this phase of labor law is succinctly described in the words of Justice Harlan in his concurring opinion in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 273 (1964), wherein he said:

> "As is recognized by all, neither position in this case is without its difficulties. Lacking a clear-cut command in the statute itself, the choice in substance lies between a course which would altogether preclude any attempt at resolving disputes of this kind by arbitration, and one which at worst will expose those concerned to the hazard of duplicative proceedings. The undesirable consequences of the first alternative are inevitable, those of the second conjectural. As between the two, I think the Court at this early stage of experience in this area rightly chooses the latter."

Not every controversy arising out of a collective bargaining contract can be validly described as a statutory unfair labor practice. However, occasions often do develop where the questioned conduct giving rise to the dispute takes on a dual aspect. This ordinarily occurs when the challenged acts creating the dispute are so intertwined with statutory and contractual controls as to cause them to be-

come almost indistinguishable in their origin. Thus, where a claim may not be factually sustainable under strict contractual terms, the Company's conduct may sometimes be described as a pretext to an overall continuing program of discriminatory unfair labor practices. The Court must fashion a workable procedure, which will not only encourage respect for the terms of the labor contract by enforcing promptly executed arbitration procedures, but at the same time it must be sensitive to carrying out the protective purposes of the federal statutory law against discrimination and unfair labor practices.

> "The strong reliance upon arbitration as a means of peacefully and expeditiously resolving labor disputes, evidenced in the drafting of section 301 and its interpretation by the Supreme Court, see e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 . . . might be immeasurably frustrated were it within the power of a recalcitrant party to assert that his conduct, alleged to be a breach of contract, is also an unfair labor practice and within the sole domain of the NLRB; almost any breach of a collective bargaining agreement could successfully be garbed as an unfair labor practice . . . . (A)ll of these factors are incompatible with an assertion that courts or arbitrators must necessarily be deprived of jurisdiction over disputes which in some form or other trench upon the possible, but as yet unexercised, use of power by the National Labor Relations Board." *Carey* v. *General Electric Company,* 315 F.2d 499, 509 (2 Cir. 1963).

Here the respondent Union, through its counsel, openly asserts that it intentionally waived the employee's right to use the contractual grievance procedures afforded under the labor contract, by deliberately permitting the expiration of the five-day limitation period, and then filing a formal complaint with the NLRB. The Union stresses that since

the employee, Tobin, is the only person aggrieved by the alleged unlawful suspension, no grievance exists on which the Company might assert a right to arbitration. It suggests that the only aggrievement the Company might allege is that the Union chose to exercise its statutory right to file a complaint with the Board; and, since the filing period for the employee's grievance has expired, the same contractual time for the limitation bars the Company from claiming a grievance under Article VII, § 1, step 3(b). Finally, the Union points to the transcript of the contract negotiation sessions relating to grievance procedures, to demonstrate that the parties never agreed to bargain and negotiate all employee complaints affecting working conditions[10] and at no time intended to forego its statutory rights to file charges covering any grievance within the jurisdiction of the NLRB.

It has long been recognized that the statutory right to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract.

> "These decisions are based on the express language of § 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), which provides in part:
>
> > 'The Board is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.'
>
> "This express statutory mandate, in turn, reflects the theory enunciated by the Supreme Court in the National Licorice Co. v. N.L.R.B.: 'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.' 309 U.S. at 364, 60 S.Ct. at 577. This

[10] Defendant's Exhibits "Q(1)", "Q(2)", "Q(3)", and "R".

public interest in preventing unfair labor practices cannot be entirely foreclosed by a purely private arrangement, no matter how attractive the arrangement may appear to be to the individual participants." *Lodge 743, Int. Ass'n. of Mach.* v. *United Aircraft Corp.*, 337 F.2d 5, 8-9 (2 Cir. 1964). See *Dubo Mfg. Co.*, 142 N.L.R.B. 431, 53 L.R.R.M. 1070.

If the Union's present approach to this dispute were tenable, it would mean that the Union in its exclusive discretion could evade, at will, the contract arbitration process by deliberately refraining from submitting the alleged grievance within the five (5) day limitation period and then filing its complaint with the Board. Such unilateral action on the part of the Union, if permissible, would totally destroy the mutuality of the substantive terms of the labor agreement on this very important and basic contractual consideration.

"Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concommitant undertaking of the union to refrain from striking." *Boys Markets* v. *Clerk's Union*, 38 U.S.L.W. 4462 (U.S. June 1, 1970).

In an analogous situation, the employee-plaintiffs alleged job discrimination pursuant to a civil rights statutory remedy, where grievances were subject to an arbitration clause in the collective bargaining contract; in that instance, the court unequivocally stated:

"The situation facing the trial court was one in which there exists concurrent jurisdiction under the statutory scheme and under the grievance and arbitration process for the resolution of claims against an employer and a union. The analogy to labor disputes involving con-

current jurisdiction of the N.L.R.B. and the arbitration process is not merely compelling, we hold it conclusive.

> "While we recognize that there is a burden placed on the defendant who must defend in two different fora, we also note that there may be crucial differences between the two processes and the remedy afforded by each. Also, as with unfair labor practice cases, in a case involving an alleged breach of a contract brought before an arbitrator, the arbitrator may consider himself bound to apply the contract and not give the types of remedy which are available under the statute. Conversely, an action in court may not be able to delve into all the ramifications of the contract nor afford some types of relief available through arbitration . . . ." *Bowe* v. *Colgate-Palmolive Company,* 416 F.2d 711, 714-15 (7 Cir. 1969). See *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432, 437-439 (1967).

The Union asserts that this is not a case where "a difference arises between the Company, the Union or any employee concerning the interpretation, application or compliance with the provisions of this agreement," controlled by Article VII, § 1 of the contract. It contends that even if arbitration were resorted to, it could not be expected to effectively dispose of the basic issues in dispute. Whether or not the time period had elapsed for the Company to assert its claim to arbitrate, or what the facts disclosed at such a hearing might reveal, are all matters properly to be decided by the named arbiters pursuant to Article VII, § 3(g) of the contract. The arbitration process will not preclude or otherwise limit the Union's right to simultaneously process its statutory grievance before the NLRB. It shall be the Board's prerogative, depending upon the facts and circumstance of the particular case, to exercise its discretion to either refrain from conducting a parallel investigation and hearing pending the arbiter's findings, or if the facts warrant, to proceed forthwith to a prompt

adjudication and enforcement consistent with its statutory responsibilities.

> "Proceeding with the arbitration will not disrupt or interfere with the Labor Board case .... So far as cost or inconvenience of producing like or similar evidence before the arbiter is concerned, no policy defined in the Labor Act affords any immunity to the parties to an arbitration agreement. . . . Actually, there are quite separate rights involving separate legal and factual issues. In the arbitration proceeding, the Union is seeking to enforce the contractual right of employees not to be discharged 'unjustly'. On the other hand, what is at issue in the Labor Board proceeding is the statutory rights of employees not to be discharged because of their union membership or because of anti-union discriminatory purposes on the employer's part." *United Steelworkers* v. *American Internat'l. Aluminum Corp.*, 334 F.2d 147, 152 (5 Cir. 1964).

The mere fact that the plaintiff-employer here suspended the employee without simultaneously filing a grievance does not preclude the latter from requesting arbitration. Article VII, § 6 of the agreement clearly defines this time limitation as affecting only the employee's right to file such a grievance and it vests in the employer the discretion to waive the time limitation for a satisfactory reason.

> "(T)he court's function is limited to determining whether there is any reasonable construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. Under the *Steelworkers* doctrine:
>
> > 'Apart from matters that the parties specifically exclude, all of the questions on which the parties dis-

agree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.'

* * * * * *

'An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' *Warrior & Gulf,* 363 U.S. at 581, 582-583, 80 S.Ct. at 1352." *International U. of E., R. & M. Wkrs.* v. *General Electric Co.,* 407 F.2d 253, 256 (2 Cir. 1968).

The respondent Union represents that the case of *Old Dutch Farms, Inc.* v. *Milk Drivers & Dairy Emp. Union,* 359 F.2d 598 (2 Cir. 1966), is controlling and dispositive of the issue raised, however, the Court is not persuaded. In that case, the court distinguished between contract actions brought under § 301(a), where the subject matter has been traditionally within the province of arbitration, as compared with tort claims filed under § 303. It pointed out that the latter group requires an explicit statement directing arbitration otherwise they are peculiarly suited for judicial interpretation. See *Vaca* v. *Sipes,* 386 U.S. 171, 179 (1967); *Twin Excavating Co.* v. *Local Union 731, Excavating, Etc.,* 337 F.2d 437 (7 Cir. 1964); *Silvercup Bakers, Inc.* v. *Fink Baking Corp.,* 273 F. Supp. 159 (1967).

Tobin's conduct unquestionably created friction in the normal employer-employee relationship under the contract. If the claimed conduct violated Article IV of the collective bargaining agreement,[11] then a grievable dispute existed, which was subject to the Grievance Procedure under Article VII. When the Union filed the charges against the

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[11] See note 2, *supra.*

employer, the latter became alerted for the first time that the Union formally regarded the employer's action as unjustifiable. It is for one of the arbitrators named in the agreement to hear the facts and make his findings.

> "Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 555 (1964).

> "Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration." *Id.* at 557.

It is a commonly accepted precept that labor-management frictions and misunderstandings should be recognized and treated early in their origin. It is then that problems are of manageable size and subject to remedial measures, with a minimal harm and scarring to the participants. Courts have thus encouraged the principals in collective bargaining agreements to create a forum of their own, wherein such disputes can promptly be resolved. The present dispute has created a grievance between the parties. Arbitration will determine whether or not the employee's conduct was justified under the terms of the contract. Arbitration will not in any manner frustrate, invade or otherwise interfere with the NLRB's action relating to the Union's charge of unfair labor practice under the statute. While the Court's

recognition of contractual arbitration may provide some duplicity in this case, it will generally encourage the prompt utilization of this facility by both parties except where statutory relief is required to eliminate a course of unlawful conduct.

The Court finds that the plaintiff has presented a grievance cognizable within the terms of the labor agreement; and the Union has a contractual duty to arbitrate the same. The parties shall within five (5) days submit an appropriate order to the Court. So ORDERED.

The foregoing opinion shall constitute the findings of fact and conclusions of law required to be filed by the Court pursuant to Rule 52(a), Fed. R. Civ. P.

Dated at Hartford, Connecticut, this 17th day of June, 1970.

/s/ T. EMMET CLARIE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 13,760

[Caption Omitted]

Order

The Court, having found and concluded in its Memorandum of Decision dated June 17, 1970, that United Aircraft Corporation had presented a grievance cognizable within the terms of the current collective bargaining agreement between it and Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO; that the said Union has a contractual duty under the said agreement to arbitrate the aforesaid grievance; and that the said Union nevertheless has refused the Company's request so to arbitrate, hereby issues its order as follows:

ORDERED, that Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO, submit to arbitration, not later than ten (10) days following the date of this Order, the grievance filed by United Aircraft Corporation with respect to the suspension of employee Theodore Tobin as requested by United Aircraft Corporation on January 29, 1970, as it relates to Article IV and Appendix A, Section 1 of the collective bargaining agreement.

Dated at Hartford, Connecticut, this 24th day of June, 1970.

/s/ T. EMMET CLARIE
United States District Judge

• • • • • • • • • • •

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 13,760

[Caption Omitted]

Amendment to Memorandum of Decision

The Court's Memorandum of Decision in the above entitled matter, filed June 18, 1970, is hereby amended and corrected as follows:

1. On page 12 of the Memorandum, the second sentence of the second paragraph is amended to read:

> "If the claimed conduct violated Article IV or Appendix A, Section 1, of the collective bargaining agreement,[11] then a grievable dispute existed, which was subject to the Grievance Procedure under Article VII."

2. Footnote 2 is amended by adding:

Appendix A, Section 1 provides:

"The union shall assume all responsibility for the distribution and collection of payroll deduction assignment cards for union dues and the initiation fee, and agrees that such distribution and collection will not be carried on during working hours on company premises."

So Ordered.

Dated at Hartford, Connecticut, this 24th day of June, 1970.

/s/ T. Emmet Clarie
United States District Judge

* * * * * * * * * *

NATIONAL LABOR RELATIONS BOARD

REGION 1

John F. Kennedy Federal Building
Boston, Massachusetts 02203
Telephone 223-3300

December 10, 1968

Joseph C. Wells, Esquire
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Re: Industrial Aircraft Lodge No. 1746 and Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO (United Aircraft Corporation, Pratt & Whitney Aircraft Division) Case No. 1-CB-1429

Dear Sir:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

It does not appear that further proceedings on the charge are warranted inasmuch as the disputes alluded to in the instant charge filed by you are alleged in charges filed by the Unions to involve violations of Sec. 8(a) of the Act. There is no mandatory obligation to bargain as to these alleged violations of the Act. Therefore, no violation of Sec. 8(b)(3) is found in the Union's refusal to file grievances or otherwise to bargain collectively concerning the disciplinary actions against employees referred to in your charge. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the Na-

tional Labor Relations Board, Washington, D. C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on December 23, 1968. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extention of time should be submitted to me.

Very truly yours,

ALBERT J. HOBAN
Albert J. Hoban
Regional Director

Certified No. 614801
Return Receipt Requested

* * * * * * * * * *

[Distribution List Omitted]

NATIONAL LABOR RELATIONS BOARD

REGION 1

John F. Kennedy Federal Building
Boston, Massachusetts 02203
Telephone 223-3300

April 22, 1969

Joseph C. Wells, Esquire
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Re: Industrial Aircraft Lodge No. 1746, International Association of Machinists and Aerospace Workers, AFL-CIO (United Aircraft Corporation, Pratt & Whitney Aircraft Division) Case No. 1-CB-1474

Dear Sir:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

It does not appear that further proceedings on the charge are warranted inasmuch as the Employer's grievance pertained to the discharge of an employee alleged by the Union as having been in violation of Sec. 8(a)(3), a matter now pending before a Trial Examiner. Essentially the same issue was presented in Case No. 1-CB-1429 and the fact that the Employer, herein, filed a grievance under the contract was not considered to require a disposition different from that in the earlier case. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D. C. 20570, and a

copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on May 5, 1969. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

Very truly yours,

ALBERT J. HOBAN
Albert J. Hoban
Regional Director

Certified No. 614846
Return Receipt Requested

* * * * * * * * * *

[Distribution List Omitted]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington, D. C. 20570

July 15, 1969

Re: Industrial Aircraft Lodge No. 1746 International Association of Machinists and Aerospace Workers, AFL-CIO (United Aircraft Corporation, Pratt & Whitney Aircraft Division) Case No. 1-CB-1474

Joseph C. Wells, Esq.
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Dear Mr. Wells:

Your appeal from the refusal to issue complaint in the captioned case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

The appeal is denied. In the absence of a strike or other economic pressure by the Union, the Company could have been "aggrieved" only by the Union's resort to Board processes, which Section 10(a) of the Act keeps available regardless of "any other means of adjustment." See *Producers Grain Corp.*, 169 NLRB No. 68. Hence, apart from other considerations, absent any properly grievable issue, the Union's rejection of the Company's "grievance" did not constitute a violation of the Act. The purported analogy to the Union's right to grieve while pressing an unfair labor practice charge is inept in view of the Company's right of positive action, including management of the plant and direction of the working force, *vis a vis* the Union's mere negative right of protesting, through a grievance procedure, unreasonable exercise of managerial authority. See, e.g., *American Chain & Cable Co.*, 17 LRRM 1532, 1533 (War Labor Board, 1945).

Very truly yours,

ARNOLD ORDMAN
General Counsel

By IRVING M. HERMAN
Irving M. Herman
Director, Office of Appeals

cc: Director, 1st Region

CERTIFIED MAIL

[Distribution List omitted]

Excerpts From Decision of NLRB in United Aircraft Corporation and Lodges 1746 and 700, IAMAW, AFL-CIO, 180 NLRB No. 49, p. 2, n. 2, Case No. 1-CA-6475, et al.

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[2] The Respondent argues, in effect, that the Board's powers may not be invoked or should not be exercised in this case because of the existence of a provision in the collective-bargaining agreement authorizing arbitration in the event of employee grievances, including discharges. In this connection, the existence of a grievance-arbitration procedure in a collective agreement does not oust the Board of its power, nor relieve it of its public duty, to act to inhibit unfair labor practices cognizable under the Act. Section 10(a) of the Act explicitly provides that the power of the Board with respect to unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." In cases of this type, the Board has been unwilling to defer to available arbitration, where the parties themselves have chosen not to resort to that forum; we find no justification for abandoning our statutory authority here. See, e.g., *Morrison-Knudsen Company, Inc.*, 173 NLRB No. 12; *The Coachman's Inn*, 147 NLRB 278, 306.

Excerpts From Decision of Trial Examiner in NLRB No. 1-CA-6475, et al., pp. 21-22

C. *Respondent's Efforts to Channel Discipline Cases Into Grievance-Arbitration Procedure*

At all times here material the collective-bargaining agreement between the parties has provided as follows (Article IV, 1968 contract):

> There shall be no solicitation of employees for union membership or dues conducted upon the premises of the company during working hours by the union, its representatives or by employees.

The Respondent's rule book, "You and Your Company," provides in Rule 5 that among the "strictly forbidden" practices are:

> Gambling, taking orders, selling tickets, or soliciting money or any other type of solicitation.

Over the years the Respondent has posted notices admonishing against solicitation activities. Thus, by notice dated March 26, 1968, employees were advised:

> With the exception of Company-approved charitable solicitations of a plant-wide nature, there should be no solicitation of money or any other type of solicitation during working hours on Company premises without the specific prior approval for each such solicitation . . . .

Other plant bulletins deal solely with solicitation for union membership and emphasize that employees are expected "to adhere strictly" to the contractual provision and Company rule set forth above.

Following the suspension of Wing and Pegorer the Respondent wrote to Lodge 700 of the Union on September 19, 1968, noting that no grievance had been filed regarding their suspension and pointing out that the then current contract obligated the parties to make "an earnest effort" to resolve differences through the grievance procedure, including arbitration if necessary. The Respondent requested the Union to state "whether in fact a difference" existed concerning the suspensions and asked if the Union would comply with the Respondent's request "to resolve such differences by bargaining through the procedures established by the contract—including, if necessary, arbitration." The Union replied under date of October 1, refusing the Respondent's request, stating that it would shortly file unfair labor practices covering Wing's case, and contending that his suspension was "no mere contract

dispute'' but rather was ''part and parcel of the Company's continuing program of unfair labor practices, designed to decimate, degrade, disparage and disable the Union, to prevent it from functioning effectively as statutory bargaining agent.[7] Unfair labor practice charges were filed as to Wing and Ardenski, and the Regional Director issued a complaint thereon on December 30.

In the meantime, the contract expired on November 30, 1968, and negotiations for a new agreement had been entered into by the parties. During these negotiations the Respondent, on November 26, proposed an amendment to the contract grievance provision which would allow the Respondent the right at the fourth step to file a grievance concerning the discharge or suspension of an employee ''in the event that either an employee or the union filed a charge'' with the Board ''alleging that his discharge or suspension was a violation'' of the Act, which ''grievance'' could be processed through arbitration, if necessary. The Union rejected this proposal. At the November 29 negotiations session the Respondent proposed that such a grievance could be filed at the third step, explaining that it was not dependent upon the employee or the Union having first filed a charge with the Board, ''simply to provide a vehicle for the company to determine whether in fact there is any dispute concerning'' the discharge or suspension ''and if so, to resolve it by bargaining . . . or in arbitration.'' The Respondent made clear that its proposal did not preclude the Union or the employee from filing charges with the Board.

In final negotiations on November 30 the Union accepted the Respondent's proposal, but then read a prepared statement stating that by entering into the agreement it ''does not intend to waive, and has not waived, any statutory

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[7] Also by letter dated September 19 to Lodge 1746, the Respondent made a similar inquiry regarding Ardenski's discharge and under date of October 1 received a substantially similar reply.

rights'' and contending that certain provisions including the one allowing the Company ''to process a grievance under the 'just cause' provision,'' ''violate our statutory rights'' and were accepted ''under coercion'' and the Union intended ''to challenge their legality.''

On January 21, 1969, a week after having discharged Wiseman, the Respondent filed its ''grievance concerning the discharge'' of Wiseman, placing the grievance at the third step agenda for discussion at the Committee of Management meeting scheduled for January 23, explaining that it was Respondent's position that ''Mr. Wiseman was discharged for just cause.'' At the third step meeting on January 23, the Union refused to discuss this ''grievance''; its representative read a prepared statement that, upon advice of counsel, ''the Union considers this discharge a violation of statutory rights and an unfair labor practice'' and, accordingly, ''refuse[d] to subject this discharge to the grievance procedure and will file an unfair labor practice charge with the Board.''

In the fourth step meeting held on January 31 the Respondent again stated its position was that Wiseman ''was discharged for just cause because he solicited for Union membership during working hours on Company premises.'' The Union's representative reiterated that the Union considered the discharge a violation of statutory rights and had filed unfair labor practice charges. Alluding to an earlier indication from a union representative that the Union could provide witnesses who would establish ''that Wiseman had been threatened by other employees who said they were out to 'get' him,'' Respondent's representative urged that the Union was under obligation to inform the Company if they had any information that Wiseman ''was not guilty,'' and stated that the Respondent would thereupon check into the situation and take corrective action if that were indicated.

Under date of February 4, 1969, the Respondent wrote the Union on the Wiseman case, stating it was appealing

the case to arbitration and proposing that the matter be heard by Arbitrator I. Robert Feinberg, one of the arbitrators agreed upon in the contract. The Union replied under date of February 11, stating that in its view, "the provision of the contract for submission to arbitration of specified disputes . . . has no relevance or application to this case." Accordingly, the Union declined to join in designating Mr. Feinberg to hear the case.[8]

D. *Contentions and Discussion*

The General Counsel cogently argues that the Respondent disparately, "excessively," and "coercively" enforced its no-solicitation rule and contract provision as to each of the three alleged discriminatees. The Union echoes this argument. In addition, the General Counsel urges that the statutory rights of the employees must here be vindicated by appropriate remedial action. On this facet, the Union underscores and elaborates on the legal points made by General Counsel, contending not only that this is not a proper case in which the Board should refer the parties to use of their grievance-arbitration procedures, but that to do so would be destructive of well-recognized statutory rights. Moreover, argues counsel for the Union, the Respondent, in urging that the alleged discrimination against

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[8] The Union also alluded to a prior charge (1-CB-1429) filed by the Respondent stemming, apparently, from the Wing and Ardenski cases, which the Regional Director dismissed. The Union stated that it considered "your invocation of the grievance and arbitration provisions of the contract in this case as attempt to circumvent the decision of the Regional Director in Case No. 1-CB-1429, and defeat the statutory right and immunity there recognized and vindicated. We cannot and will not acquiesce." The Respondent did not appeal to the General Counsel. On February 20, 1969, the Respondent filed another charge (1-CB-1474) alleging that the Union's action in refusing to handle the Wiseman case through the grievance-arbitration procedure was a violation of the Union's obligation to bargain. The Regional Director refused to issue a complaint and on July 15, 1969, the General Counsel affirmed such disposition of that case.

the individuals here involved should have been submitted to the grievance procedure provided by the collective-bargaining agreement, is attempting to assert a right to have its statutory breaches settled outside the Board's exclusive jurisdiction and is seeking to invoke against the Union a waiver of access to the Board's processes which plainly has, at best, been agreed to under protest. Briefly stated, the Respondent contends that the "common law" of the shop, as interpreted and applied in arbitrations over the years, clearly requires a strict construction of the "no-solicitation" rule and that the individuals alleged to have been discriminated against in fact did violate the rule or, at the least, were believed by the Respondent, in good faith, to have done so.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISON OF TRIAL EXAMINERS
WASHINGTON, D. C.

UNITED AIRCRAFT CORPORATION
(PRATT & WHITNEY DIVISION)

and

CANEL LODGE 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Case No. 1-CA-6967

Order

I. On April 14, 1970, the Charging Party moved to correct the record by noting the appearances of Plato E. Papps, Esq., and Mozart G. Ratner, Esq., as counsel for it. No objection was made to such motion. It is hereby granted.

II. On April 15, 1970, the General Counsel moved to amend paragraph 1 of the complaint by adding the following sentence:

> The amended charge in this proceeding was filed by the Union on April 2, 1970, and a copy thereof was served upon Respondent on said late. [sic]

The General Counsel further moved that a copy of the amended charge and of the affidavit of service thereof be received in evidence as General Counsel's Exhibits 1(g) and 1(h), respectively.

There was no objection to the foregoing motions and they are hereby granted.

III. At the hearing Respondent moved to stay further action herein pending the outcome of a proceeding to compel arbitration instituted by Respondent in the United

States District Court for the District of Connecticut. Ruling was reserved on this motion and testimony was taken on a provisional basis.

The only issue litigated was whether Respondent had discriminated against Tobin, a Union shop steward, by suspending him for one day because of an incident involving the delivery to him of a Union membership card and dues check-off card during worktime. The Union's contract with Respondent prohibited the collection of dues checkoff cards during worktime. (See Appendix A, Section 1, on p. 64, of "Exhibit A" attached to Respondent's Exhibit 1.) Article IV of that contract also prohibits discrimination against employees for engaging in Union activities. Article VII prescribes an elaborate grievance procedure culminating in arbitration. However, no grievance was filed by the shop steward here involved. Instead, the Union filed a charge with the Board which resulted in the instant proceeding. Respondent then brought suit to compel arbitration.

Thus, this dispute over one-day's suspension of an employee is now engaging the attention of a Board Trial Examiner and a federal court, and, if it take [sic] the same course as other litigation between the same parties, this dispute will ultimately require consideration by Board members and a federal appellate court,[1] and will consume untold man-hours of their time as well as of the time of Board staff members and of the staff of the General Counsel, in addition to the time already spent thereon. If one adds the value of the services of Respondent's counsel and Union's counsel, it would seem that a conservative estimate of the expense of litigating this matter, as well as the arbitration case, will run into several thousands of dollars.

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[1] For a partial resume of previous Board litigation involving Respondent and various IAM Locals, see pp. 2-4 of the General Counsel's brief in the instant case. It may be noted also, that in its brief herein, the Union asserts that the pending suit to compel arbitration will be carried either by it or Respondent to the appeals court.

It is true that more is involved here than one day's back-pay for one man. If Respondent is ultimately found to have discriminated against Tobin, the conventional remedy would include a requirement that it post a notice promising not to discriminate against employees for Union activity. However, the Board has recently issued two decisions finding that Respondent discharged or suspended a number of employees, including union stewards, for Union activity and requiring it to post at various of its plants, including the one here involved, notices abjuring any future resort to such conduct.[2] Petitions for review of both those cases are pending before the Court of Appeals for the Second Circuit. If the Board prevails in either of those cases, an appropriate notice will have to be posted by Respondent, which will presumably cure the coercive effect of any past discrimination, including that here involved.

It is clear, therefore, that apart from compensating Tobin for loss of one day's pay, little, if anything, will be gained by the inordinate expenditure of money and time required to process this matter further. In view of this, it may not be too much to hope that the parties, with the help of their exceptionally able counsel, will devise some formula for disposing of this matter without further litigation.

At any rate, in view of the concurrent resort by the Union and Respondent to different forums, it would seem appropriate to withhold any further action herein pending the outcome of the suit to compel arbitration. Accordingly, Respondent's motion to stay is hereby granted.[3]

/s/ SIDNEY SHERMAN
Sidney Sherman
Trial Examiner

Dated: May 15, 1970
Washington, D. C.

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[2] *United Aircraft Corporation,* 180 NLRB No. 49; 179 NLRB No. 160.

JUNE 3, 1970
6:54 PM

LLD217 WA241
(TX) GRC GOVT PDB WASHINGTON DC 3 415P EDT

MOZART G. RATNER

818 18TH ST NORTHWEST WASHDC

RE UNITED AIRCRAFT CORP (PRATT AND WHITNEY

DIVSN) 1-CA 6967.

GENERAL COUNSELS AND CHARGING PARTYS REQUEST FOR SPECIAL PERMISSION TO APPEAL TRIAL EXAMINERS RULING GRANTING RESPONDENTS REQUEST TO STAY FURTHER PROCEEDINGS PENDING OUTCOME OF RESPONDENTS PETITION IN DISTRICT OF CONNECTICUT COURT OF COMPEL ARBITRATION IS HEREBY GRANTED, THE APPEAL IS GRANTED AND THE TRIAL EXAMINER IS REVERSED. THE TRIAL EXAMINER IS DIRECTED TO PROCEED FORTHWITH WITH HIS DECISION ON THE MERITS OF THE PROCEEDING. BY DIRECTION OF THE BOARD
GEORGE A LEET ASSOC EXEC SECY
1-CA 6967
(511).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 1-CA-6967

UNITED AIRCRAFT CORPORATION
(PRATT & WHITNEY DIVISION)

and

CANEL LODGE 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Ruling on Motion To Defer Action

At the hearing in the above case Respondent moved to stay further action on the complaint pending the outcome of a proceeding to compel arbitration then pending before a federal district court. On May 15, 1970, I issued

an order granting that motion. On June 3, that order was reversed by the Board, which directed that this Examiner "proceed forthwith with his decision on the merits."

On June 22, Respondent filed with me a new motion for a stay pending arbitration, citing the fact that the district court had on June 17, ordered arbitration.[1] Respondent cites *Dubo Manufacturing Co.*, 142 NLRB 431, where the Board stayed action on the 8(a)(3) allegations of the complaint, because a federal district court had ordered arbitration in a suit filed by the union, which was the charging party before the Board. Here, the suit was filed by the respondent before the Board. However, the Board's decision in *Dubo* did not turn on any policy against permitting a party to pursue concurrent remedies simultaneously, but rather on the legislative and administrative policy of encouraging resort to an available grievance procedure. The Board there stated:

> The policy considerations are clearly applicable here where not only the parties have available a procedure to settle the dispute, but a United States District Court has ordered them to utilize it. It would certainly frustrate the intent expressed by Congress if the Board were now to permit the use of the Board's processes to enable the parties to avoid their contractual obligations as interpreted by the court.

It is not clear why the same considerations would not apply here. However, in issuing its order of June 3, the Board presumably took into account the possibility that the court would order arbitration. Yet, the Board did not see fit to make any provision for such contingency, ordering that the case be processed forthwith on the merits.

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[1] A copy of the court's ruling is appended to Respondent's motion. Its prayer for permission to "lodge" such ruling with the Examiner is hereby granted. The Union filed opposition to Respondent's motion to defer.

Accordingly, I construe the Board's order as dispositive, at least by implication, of the issue now raised and as binding me to continue with such processing, notwithstanding the action of the court. The present motion is therefore denied. However, as the matter is not entirely free from doubt, I will suspend any further action on the merits until Respondent has exhausted its right to appeal to the Board from this ruling, and, in the event of such appeal, until the Board has acted thereon.

/s/ SIDNEY SHERMAN
Sidney Sherman
Trial Examiner

Dated: June 24, 1970
Washington, D. C.

TXA058 A WA130
(TX) EM GOVT PDB WUX/ WASHINGTON DC 1 1019A EDT
MOZART G RATNER

818 EIGHTEENTH ST NORTHWEST WASHDC

RE: UNITED AIRCRAFT CORPORATION (PRATT & WHITNEY DIVISION), 1-CA-6967.

CHARGING PARTYS REQUEST FOR SPECIAL PERMISSION TO APPEAL TRIAL EXAMINER'S RULING DEFERRING DECISION UNTIL APPEAL IS TAKEN AND RULED UPON IS HEREBY GRANTED, THE APPEAL IS GRANTED AND THE TRIAL EXAMINER IS REVERSED. HE IS DIRECTED TO DECIDE AND ISSUE HIS DECISION WITHOUT FURTHER DELAY. BY DIRECTION OF THE BOARD

GEORGE A LEET ASSOC EXEC SECY NLRB.

1-CA-6967. (104)

TXD-385-70
Middletown, Conn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 1-CA-6967

UNITED AIRCRAFT CORPORATION
(PRATT & WHITNEY DIVISION)

and

CANEL LODGE 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

A. Gene Niro, Esq.,
for the General Counsel.

Joseph C. Wells, Esq., Washington, D. C.,
for Respondent.

Stephen D. Gordon, Esq.,
Mozart G. Ratner, Esq., and
Plato E. Papps, Esq., Washington, D. C.,
for the Charging Party.

Trial Examiner's Decision

SIDNEY SHERMAN, Trial Examiner: The original charge herein was served upon Respondent on January 8, 1970, the complaint issued on February 12, and the case was heard on April 2. The only issue litigated was the legality of the suspension of a Union steward under Section 8(a)(3) of the Act. After the hearing, briefs were filed by all parties.

Upon the entire record[1] including observation of demeanor, the following findings and recommendations are adopted.

I. Respondent

United Aircraft Corporation, herein called Respondent, is a Delaware corporation and is engaged at its plants in Connecticut in the manufacture of aircraft engines and related products. It annually receives, and ships, in interstate commerce products exceeding $1,000,000 in value. Respondent is engaged in commerce under the Act.

II. The Union

Canel Lodge 700, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called the Union, is a labor organization under the Act.

III. The Unfair Labor Practices

The only issue herein is whether Respondent discriminated against Tobin, a Union shop steward, with respect to certain disciplinary action taken against him.

A. *Sequence of Events*

At the time of the hearing, in April 1970, Tobin had been a Union shop steward at the instant plant in Middletown, Connecticut, for about 1 year, had been the Union's recording-secretary since August 1969, and had in 1969 successfully solicited 34 employees to join the Union. He had worked for Respondent over 4 years, had received a number of promotions, and in August 1969, received a commendation for saving two fellow-employees from injury. He had been the object of disciplinary action only once—in 1966, when he was reprimanded for absenteeism.

The current Union contract provides for check-off of Union dues and initiation fees, but contains a stipulation that no check-off authorization cards will be distributed or

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[1] For corrections of the transcript, see the order of June 9, 1970.

collected during working hours on company premises.[2] There is also a plant rule and a contract provision limiting solicitation by employees.

On December 15, Graves executed a membership application card and a check-off authorization card and while at work solicited the advice of another employee, Tibbits, as to how these cards could be transmitted to the Union, and, when Tibbits volunteered to deliver them to a Union steward, Graves gave him the cards. Tibbits then approached Tobin and, without explaining the nature of the cards, handed them to him. Upon perceiving what the cards were, Tobin observed that "this" could not be done on company time and dropped them on a table. However, upon seeing a supervisor approach, Tobin immediately covered the cards with a sheet of paper, and, when asked by the supervisor what was going on, gave a non-committal answer, but, as the supervisor drew nearer, and it appeared that he would discover the truth, in any event, Tobin decided to make a clean breast of the matter. Uncovering the cards, he explained that Tibbits had attempted to pass them to him. The entire incident lasted less than a minute.[3]

The next day, Respondent launched an investigation and on December 29, Tobin was notified of his suspension from

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[2] This stipulation is contained in Appendix A of the contract and reads as follows:

> Section 1. The union shall assume all responsibility for the distribution and collection of payroll deduction assignment cards for union dues and the initiation fee, and agrees that such distribution and collection will not be carried on during working hours on company premises.

[3] The foregoing findings are based on the testimony of Tobin, which was in the main consistent with that of Tibbits, except that the latter insisted that it was the supervisor, and not Tobin, who uncovered the cards. However, as Respondent failed to call the supervisor, and no explanation was offered for such failure, it is inferred that he would not support Tibbits in that regard. Accordingly, Tobin is credited. In any event, even if Tibbits be credited, that circumstance, as will appear from the ensuing discussion, would not affect the ultimate result herein.

work for one day without pay, on account of his role in the matter, such suspension to be effective the next day. Tibbits received only a written reprimand and Graves an oral one.

Although the Union contract contains an elaborate grievance procedure culminating in arbitration, no grievance was filed thereunder by the Union or Tobin. Instead, the Union filed the instant charge, whereupon Respondent filed suit in federal district court to compel arbitration of "a dispute concerning the disciplinary suspension" of Tobin. That suit is still pending.[4]

B. *Discussion*

The General Counsel and the Union contend as follows:

(a) Tobin did not in fact violate any company rule or contract provision, since he was not engaged in collecting the cards when the supervisor appeared, but was in fact in the process of rejecting cards which had been thrust upon him.

(b) Tibbits, who was not a Union member, received a lesser penalty, notwithstanding that his misconduct was clearer than Tobin's.

(c) Respondent has a history of discharging Union stewards for discriminatory reasons under the guise of enforcing a plant rule or contract provision.

(d) Respondent's motive in suspending Tobin was not concern over misuse of working time but was to discourage employees from becoming shop stewards, and to demean such stewards, and the Union, itself.

These matters will be considered *seriatim.*

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[4] On May 15, 1970, I issued an order granting Respondent's motion to stay the instant proceeding pending the outcome of such suit. This order was reversed, on appeal, by the Board, with a direction "to proceed forthwith with [a] decision on the merits." See, also, the ruling of June 24.

(a) *Did Tobin violate any plant rule or contract provision?*

Among the published plant rules is one forbidding the following conduct:

> Gambling, taking orders, selling tickets, or soliciting money or any other type of solicitation.[5]

The Union contract also bars any solicitation of employees for Union membership or dues on Company premises during working time. In addition, as noted above, the Union contract interdicts any collection of dues check-off cards during worktime.

At the hearing, Respondent's assistant personnel manager, Hall, testified that it was he who determined in the first instance the nature of the disciplinary action against Tobin, as well as Tibbits and Graves, and that he concluded from the investigative reports he received concerning the incident that Tobin had violated the afore-quoted plant rule and contract clause against solicitation, as well as the contractual prohibition of the collection of check-off authorizations. Hall explained that he regarded Tobin's receipt of Graves' check-off authorization card under the circumstances described above as constituting "collection" of the card within the intendment of the contract, and that he equated collecting such cards with the sort of solicitation that was proscribed by rule and contract. In its brief, however, Respondent makes no reference to the "solicitation" issue, relying only on the alleged breach of the contractual ban on collection of check-off cards. In any event, it is clear that the basic difference between the parties is whether there was any "collection" here by Tobin. Respondent points to various circumstances which it contends indicate that, although Graves' cards were thrust upon Tobin by Tibbits, and Tobin's initial reaction was a negative one, he finally decided to retain the cards

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[5] While such rule would on its face seem unduly broad, insofar as it applies to Union solicitation, the matter was not litigated, presumably because of the narrower, more specific language of the contract, next discussed in the text.

for delivery to the Union's headquarters. Thus, Respondent points to the fact that, instead of returning the cards to Tibbits, Tobin dropped them on a table before him and, upon perceiving the approach of a supervisor, attempted by various means to conceal from him the existence of the cards, making a complete disclosure only when he became convinced that the supervisor would discover the truth, in any event. On the other hand, the General Counsel and Union point out that, had Tobin intended to retain the cards, he could have put them in his pocket instead of dropping them on the table, and that his initial efforts at concealment of the matter from the supervisor were prompted, not by a desire to retain the cards, but rather by a fear that the supervisor would place a wrong construction on the incident.

Strangely enough, no party asked Tobin directly at the hearing whether he in fact intended to retain the cards. Since he was the General Counsel's witness, and it would clearly have been to his interest to deny any such intent, if, in fact, he had none, the failure of the General Counsel to put the question warrants an adverse reference. Accordingly, it is found that, although he at first indicated to Tibbits his reluctance to accept the cards, the approach of the supervisor forced Tobin to choose between retaining the cards or turning them over to the supervisor with an explanation of what had happened, and he chose the former alternative.[6] However, it is clear that this choice was only momentary, since, upon perceiving that the supervisor was "zeroing in" on the cards and that Tobin's efforts at concealment would therefor be unavailing, he promptly abandoned his intention to keep the cards and decided to make a full disclosure. Whether such an "on-again-off-

[6] It may well be that, as the General Counsel contends, Tobin feared that the supervisor would put a wrong construction on the incident and refuse to credit his explanation. However, that apprehension would make it all the more likely that Tobin would decide to keep the cards, since he would obviously have nothing to lose by doing so, if his only alternative was to offer an explanation which would not be accepted.

again'' intention to retain the cards, coupled with Tobin's overt acts, added up to ''collection'' under the contract is a difficult question. However, there is no need to resolve this matter, since it suffices for present purposes to find, as I do, that Respondent was, in any case, justified in believing that Tobin intended to keep the cards and that he would have kept them if the supervisor had not come upon the scene, and that he was thereby engaging in conduct forbidden by the contract. It is further found that such belief would be a valid defense to the instant charge, if that was in fact the motivating reason for the suspension of Tobin.[7] We now proceed to consider the latter issue.

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[7] While under *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21, an employer's honest belief is no defense to a charge of discrimination, regardless of motivation, that rule is limited to the situation where the employee has in fact engaged in protected concerted activities but discipline is imposed because of an erroneous belief that such activities are unprotected. Here, the situation is that Tobin was either engaged in collecting a dues check-off card during worktime, which was an unprotected concerted activity, or was refusing to collect such a card, which would be the antithesis of concerted action. Accordingly, the question of motivation is here one of fact, to be determined upon all the evidence, and is not controlled by the rule of law laid down in *Burnup and Sims, Inc.*

(While it is not clear that the Board has always strictly observed the foregoing limitation on *Burnup and Sims* (See the *dictum* in *Marion Manufacturing Company*, 161 NLRB 55, 56 (fn. 1)), such limitation is clearly spelled out in the Court's opinion, where the rule is stated as follows:

> In sum, section 8(a)(1) is violated if it is shown that *the discharged employee was at the time engaged in a protected activity*, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. (Emphasis added.)

This is in accord with the rationale of the Court that an employee should not be required to engage in concerted activities at the risk that he will be erroneously charged with some misconduct in connection therewith. That rationale would not be applicable to the case of an employee who, like Tobin, is disciplined for alleged misconduct in connection with concerted activities, if, as the General Counsel contends, he was not in fact at the time of such alleged misconduct engaging in concerted activities of any sort but was carefully eschewing such activities.)

(b) *Disparity of treatment*

As already related, although Tobin was suspended for one day, Tibbits, who was not a Union member, received the lesser panalty [sic] of a written reprimand. (Graves, an applicant for Union membership, received a still lighter penalty—an oral reprimand.) Hall acknowledged that he regarded the contractual ban on collection of check-off cards as applying not only to Union officials but to all employees,[8] and that Tibbits had therefore violated the contract. He insisted, however, at one point, that Tibbits' offense was not so serious as Tobin's, because Tibbits was merely doing another employee a favor in handing the cards to Tobin. Even after it was pointed out that Tibbits had played a more active role than Tobin, in that he had volunteered to take the cards from Graves and had thrust them upon Tobin, Hall insisted that Tibbits was "more or less an innocent victim of a request." This attempt to assimilate Tibbits' role to that of an innocent bystander reflects on Hall's candor as does his subsequent vacillation between that position and his avowal that he regarded Tobin's offense as the more serious because the contract provision represented a commitment by the Union and Tobin "was a part of that union." Moreover, such avowal is perhaps the most damaging evidence in the record against Respondent. The evident meaning thereof, considered in conjunction with Hall's prior testimony, is that, while he deemed all employees, and not only the official Union representatives, to be bound by the contract provision, he took a dimmer view of a breach by one, like

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[8] This construction of the contract seems unavoidable, since to hold only Union Officials were forbidden to collect check-off cards would defeat the purpose of the provision of preventing disruption of work. Such disruption would be likely to be just as great if the collecting were done by employees other than such officials as where it was done by them.

As to the ban in solicitation, it is clear from the text thereof that it applied to all employees.

Tobin, because he was a member of the Union's hierarchy and the provision represented an undertaking by the Union.[9] However, this is tantamount to saying that, where two employees are guilty of a breach of a provision in a union contract, the employer may base the severity of their punishment on the extent of their involvement with the union or on their position in the union's hierarchy. Respondent fails to suggest, and one is at a loss to perceive, how any such proposition may be squared with the provisions of Section 8(a)(3) of the Act.

(c) *The "pattern" theory*

The General Counsel and the Union contend, further, that Respondent's treatment of Tobin was part and parcel of its over-all strategy, as found by the Board in prior cases, of undermining the Union by denigrating its stewards. Citation is made to two recent Board decisions involving Respondent,[10] in which it was found that, in addition to a number of other unfair labor practices, disciplinary action taken by Respondent against a total of 10 Union stewards, which action ranged from a 3-day suspension to discharge, was unlawful because motivated by Union animus. In those cases, the Board rejected as pretextual Respondent's contention that the disciplinary action was based on violations of its plant rule and contractual provision against solicitation. It is now urged that, in view of the similarity of the circumstances of the instant case and such other cases, it should be found here, as there,

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[9] Hall did not contend that he held Tobin to stricter accountability because he was presumed to be more familiar with the provisions of the contract. Such a contention was precluded, in any event, by the fact that Tibbits' written statement to Respondent's investigators contained the admission that he knew that "it was wrong" for him to deliver the cards to Tobin.

[10] *United Aircraft Corp.*, 179 NLRB No. 160, and 180 NLRB No. 49.

that Respondent's true motive was to discourage Union activity.

There appears to be force to this contention. While it has been found that Respondent was justified in believing that Tobin did, in fact, engage in conduct which contravened the contract, this was also true of some of the stewards involved in the prior cases.[11] Nevertheless, the Board found upon all the evidence that it was not such misconduct but Respondent's hostility to the Union that motivated the disciplinary action taken.

(d) *Conclusion as to motivation*

Respondent points to the minimal nature of the disciplinary action against Tobin, and at first blush it seems improbable that Respondent would hope to downgrade the Union and its stewards in the eyes of the employees by such a mild measure as a one-day suspension. However, in the case of one of the stewards involved in the prior case, the discipline consisted only in a 3-day suspension. Respondent cites, also, the fact that after Tobin became shop steward he received both a promotion and a commendation. I have given due weight to this circumstance, as well as all the other matters relied upon by Respondent, but do not believe that they suffice to counterbalance the weight of the evidence of discriminatory motivation, consisting, as it does, of the pattern of discrimination against Union stewards established by the Board's findings in the earlier cases, the relative inconsequentiality of Tobin's

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[11] See the cases of stewards D'Andrea and Menard, discussed at page 8 of the Board's Decision and pp. 6 to 11 and 16 to 19 of the Trial Examiner's Decision in 179 NLRB No. 160, both of whom were found to have engaged in some improper solicitation. Moreover, as to stewards Nelson and Tardiff, as well as Menard, the Board there stated that whether or not they "actually engaged in union solicitation or activity during working time, this was merely a pretext to conceal Respondent's discriminatory motive in disciplining them."

conduct in terms of effect on production,[12] the disparity in treatment of Tobin as compared to Tibbits, the difficulty encountered by Hall in attempting to explain such disparity, and his final admission, in effect, that he meted out a more severe penalty to Tobin than to Tibbits because of Tobin's Union status. Accordingly, it appears that the evidence preponderates in favor of a finding that, in suspending Tobin, Respondent violated Section 8(a)(3) and (1) of the Act.[13]

IV. The Remedy

Having found that Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it be directed to cease and desist therefrom and take appropriate, affirmative action.

It having been found that Respondent discriminatorily suspended Tobin on December 30, 1969, I shall recommend that it be ordered to make him whole for any loss of pay resulting therefrom, less his net earnings during that period. Such backpay shall include interest at 6 percent as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

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[12] As related above, the entire incident on December 15, lasted less than a minute.

[13] In arriving at this conclusion, I have given no weight to the General Counsel's contention that, as shown by evidence adduced in the two prior cases, Respondent did not enforce any of its various prohibitions against misuse of working time, except where Union activities were involved, and that the suspension of Tobin therefore represented a unlawful, discriminatory application of such prohibitions. A similar contention was rejected by the Board in such prior cases, and is rejected here for the reasons there stated.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending Tobin on December 30, 1969, for discriminatory reasons, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that United Aircraft Corporation, its officers, agents, successors, and assigns, shall be required to:

1. Cease and desist from:

(a) Suspending employees or otherwise discriminating against them in order to discourage membership in Canel Lodge 700, International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization.

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent permitted by the proviso in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Make whole Theodore B. Tobin for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its Middletown, Connecticut, plant, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 1, shall be signed by Respondent's authorized representative, and posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[15]

Dated at Washington, D. C., July 13, 1970.

/s/ SIDNEY SHERMAN
Sidney Sherman
Trial Examiner

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[14] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[15] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps Respondent had taken to comply herewith."